deals with any proceeding "against the Government for the recovery of land or other property". It is no answer in our view to say that the Notice of Motion which resulted in this appeal cannot be described as a civil proceeding against the Government for the recovery of land or other property. It does not follow that the provision of section 29(1)(b) of the Government Proceedings Ordinance is not applicable to this case because of the plain meaning of that section. In fact that argument would be favourable to the appellant having regard to the provisions of section 8(1) and (3) of the Specific Relief Act, 1950 which read as follows:–

"8. (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, *by suit*, recover possession thereof, notwithstanding any other title that may be set up in the suit.

(3) No suit under this section shall be brought against any Government in Malaysia."

In the United Kingdom the words "civil proceedings" have been given a wide meaning. They refer to all proceedings for the enforcement or vindication or any right or the obtaining of any relief which might previously have been enforced or vindicated or obtained by the proceedings abolished by the Crown Proceedings Act, 1947. See *Halsbury's* Laws of England, Fourth Edition, Vol. 11 at pg. 752. As our law follows closely the U.K. Act, the same wide meaning should be given to the words "civil proceedings" in section 29 of our Government Proceedings Ordinance, 1956.

It is very clear from the language of section 29 that subject to two exceptions, the court may make any such order against the Government as it may make against a subject. First, an injunction or order for specific performance may not be granted against the Government, but the court may instead make an order declaratory of the rights of the parties. Secondly, an order for the recovery of land or the delivery of property may not be made against the Government, but in lieu thereof the court may make an order declaring the plaintiff to be entitled as against the Government to the land or the property or to the possession thereof.

Therefore the order of the learned judge directing the Collector to deliver possession of the land in question is contrary to the express provision of section 29(1)(b) of the Government Proceedings Ordinance, 1956.

To summarise, we agree with the appellant that there was no breach of rules of natural justice in the enquiry before the Collector. We also agree with the appellant that the order to quash GN 89 dated March 30, 1972 and the subsequent proceeding was made without jurisdiction and the order of repossession is contrary to section 29(1)(b) of the Government Proceedings Ordinance, 1956. We however disagree with the appellant that the delay of eight years from the date of Gazette Notification to the date of enquiry and award was not an abuse of power.

For the above reasons the appeal is dismissed but the order to quash G.N. 89 dated March 30, 1972 and the order of repossession be set aside. As the appellant has lost only on one ground there shall be no order on the cost of this appeal.

Appeal dismissed.

Solicitors: *Balwant Singh & Co.*

MULKH RAJ SHARMA v. SHANTI SROOP

[F.C. (Abdul Hamid, Mohamed Azmi & Hashim Yeop A. Sani F.JJ.) July 19 & September 10, 1983]

[Ipoh – Federal Court Civil Appeal No. 299 of 1982]

Practice and Procedure – Appeal from Magistrate – Question of fact – No reason to disturb finding of fact.

In this case the appellant claimed possession of premises of which he said he was the tenant and the respondent was a licensee. The respondent claimed in the defence that the appellant and the respondent were joint tenants. After hearing the parties the learned Magistrate held in favour of the appellant and gave him possession of the premises. On appeal the learned Judge reversed the decision of the Magistrate and held there was a joint tenancy. The appellant appealed to the Federal Court.

Held, allowing the appeal, there was no justification for the learned Judge to displace the Magistrate's finding on the facts and substitute his own.

Cases referred to:

(1) *In re the Estate of T.M.R.M. Vengadasalam Chettiar, Deceased* [1940] M.L.J. 155.
(2) *Chow Yee Wah & Anor.* v. *Choo Ah Pat* [1978] 2 M.L.J. 41.
(3) *Yahya bin Mohamad* v. *Chin Tuan Nam* [1975] 2 M.L.J. 117.

FEDERAL COURT.

N.T. Rajah for the appellant.

W.S.W. Davidson (*H.R. Paul* with him) for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): The appeal before us is by the plaintiff L. Mulkh Raj Sharma against the decision of Ajaib Singh J. allowing the appeal by the defendant Shanti Sroop (Ipoh C.A. No. 18 of 1980) against the decision of the Magistrate ordering the defendants, Shanti Sroop and Inderjeet Sharma, the latter having entered no defence was precluded from defending, to deliver vacant possession of premises No. 37, Lahat Road, Ipoh (we call "the premises"). We now refer only to the first defendant as "the defendant".

The parties to the proceedings are brothers. The plaintiff is the youngest while the defendant is the eldest, both sons of Lall Chand. There are two other brothers.

This case has dragged on for almost 12 years. There was an inconceivable delay and to get a clear picture of the circumstances leading to the present appeal we would state briefly that the suit filed in July 1971 was first heard in the Magistrate's Court on December 14, 1972. After a lapse of almost 1½ years the part-heard case was heard *de novo* because the Magistrate had gone on transfer. The case was fixed for June 10, 1974 but was not heard until August 26, 1977 after a lapse of another four years. The delay was to a large extent brought about by an incredible number of postponements and a sudden request for reference to arbitration. It was concluded on July 3, 1980 a lapse of another three years. It came to the High Court on appeal and the matter was disposed on October 15, 1982. The appeal before us was heard on July 18, 1983.

We would now direct our attention to the allegations contained in the statement of claim and the defence and determine the issues therefrom. Since they are quite brief, we would for convenience set out fully both the statement of claim and the statement of defence, as follows:-

STATEMENT OF CLAIM

1. The plaintiff is the tenant of premises No. 37, Lahat Road, Ipoh at a monthly rent of $70/-.
2. The defendants are brothers of the plaintiff.
3. Until June 16, 1971 the plaintiff permitted the defendants and their families to live in the premises free of any rent in view of the relationship between the parties and they have been in occupation as licensees and on June 16, 1971 by a letter of the same date sent through his solicitors the plaintiff terminated the licence and gave the defendants notice to vacate the premises.
4. The defendants have failed to vacate the premises and are in wrongful occupation. And the plaintiff claims:-
   (a) Possession of the premises.
   (b) Damages not exceeding the jurisdiction of this court.
   (c) Costs.

DEFENCE OF FIRST NAMED DEFENDANT

1. Paragraph 1 of the Statement of Claim is denied.
2. Paragraph 2 of the Statement of Claim is admitted.
3. Paragraph 3 of the Statement of Claim is denied. The first defendant has been in lawful occupation of the premises as a joint tenant since the year 1937.
4. The first defendant admits receipt of the letter dated June 15, 1971 but denies that he was a licensee, and states that the said letter was ineffective to and did not terminate his tenancy.
5. Whereof the first defendant prays that the plaintiff's claim herein be dismissed with costs.

So far as we can gather from the pleadings the central issue is whether the plaintiff is a tenant, the defendants licensees or the plaintiff and the defendant are joint tenants. There also emerges from the pleadings the question of validity of the letter by the plaintiff dated June 16, 1971, terminating the tenancy. It is asserted by the defendant that it was null and void and of no effect on the ground that he was a joint tenant.

The learned Magistrate in her grounds of decision observed that though the defendant stated that he is a joint tenant he however claimed in the course of the hearing that the tenancy was a Hindu joint family property and he is a joint tenant by virtue of his being a member of that unit. The Magistrate dealt at length on the applicability of the Hindu law of joint families and joint family properties. She also considered whether a tenancy could form part of Hindu joint family property. Proceeding on the assumption that a tenancy could so form she directed her mind to the facts available and came to the conclusion that there was no Hindu joint family as a legal entity. She then went on to say thus –

"Apart from a bald statement by D.W.1 the first defendant that a tenancy can form part of Hindu joint family property, this point was not dealt with either by the plaintiff or the defendant. No expert on Hindu law was called by

the defence. Following the case of *Sivagami Achi* v. *P.RM. Ramanathan Chettiar and Anor.* [1959] M.L.J. 221, the court is not entitled to take judicial notice of Hindu law in the absence of expert evidence or arguments based on authoritative decisions dealing with the issue before the court."

On the facts before her the learned Magistrate adverted to various aspects of the case to consider whether the plaintiff or the joint family was the tenant, namely –

(a) the background of the parties vis-a-vis the family background prior to 1937 when the plaintiff's and the defendant's father was a member of a Hindu joint family comprising of him and his six brothers, and the fact that the family was partitioned in 1937 with Lall Chand receiving the tenancy of the shop in question;

(b) the fact that throughout the years the said premises had been occupied by the parties and their families and that to this date the defendants and their families still occupy the premises;

(c) the fact that the plaintiff lived in the premises and that part of it was used as an office until 1970 when he left on account of an alleged assault by the defendant's son;

(d) the fact that neither Lall Chand nor any of the parties owned the premises but was owned by four co-owners one of whom was one Mohd. Jamil (P.W.4);

(e) rent receipts were first issued to Lall Chand until his death in 1951 when they were issued to Messrs. Shanti Sroop-Joti Sroop registered in the names of Shantisroop (eldest son of Lall Chand) and the defendant. At one stage after Lall Chand's death rent receipts were issued to the 2nd defendant (no defence filed) but finally to the plaintiff until the present day;

(f) the fact that between March 1965 and April 1968 the defendant paid the rent at a time when the plaintiff was in India. There was an assertion by the plaintiff however that he left funds to the defendant to pay the rent. No rent receipts from this period were produced. Nevertheless Mohamed Noor one of the co-owners testified that receipts were issued in the name of the plaintiff; (Magistrate accepted P.W.4's testimony and held that receipts were continued to be issued in the name of the plaintiff);

(g) rents for the ground floor of the premises (shop portion) were paid to the plaintiff for which no explanation was given by the defendant. There was also a notice of the application to increase rent and this notice was addressed to the plaintiff as tenant (Ex. P1B) (see also P11) and not as representative of the property of the joint family.

The Magistrate considered the defence contention that there was still a joint family of him and his brothers after the partition. A brother not a party to the suit was called to testify. She noted however that the defendant admitted that no accounts had been kept after the death of their father. Instead each kept his own account.

The Magistrate concluded that upon examination of the facts and even though there is a decision (*In re The Estate of T.M.R.M. Vengadalasalam Chettiar Deceased*[1] to the effect that where once a Hindu family is joint it is presumed to remain joint until the contrary is shown the presumption has been rebutted by the available evidence.

As for the ownership of the firm of Shantisroop-Jotisroop the Magistrate reviewed the evidence and came to the conclusion that it belonged not to the joint family but to the defendant and his brother as partners. In drawing the conclusion the Magistrate had regard to the accounts (P15) and the absence of any mention in the will of Lall Chand of either the firm or the tenancy. The fact that there was no Hindu joint family property was, she said, borne out by the fact that Daulratnam Estate, one of the properties in the list of assets mentioned in the will of Lall Chand, ceased to be joint family property in 1937 and had since been Lall Chand's personal property and thus the estate never became joint family property of the defendant, the plaintiff and their brothers.

The learned Magistrate examined minutely the evidence of Mohamed Jamil (P.W.4) who was the landlord and decided that his evidence could not be given much weight. She took into account the contradictions in P.W.4's testimony viewed in the light of the testimony given by him at the previous hearing in December 1972.

After viewing the evidence in totality the learned Magistrate made a finding "on the balance of probabilities" in favour of the plaintiff stating

further that "whatever might have been the arrangement between the members of the family which allowed the premises to be utilised as a family house, there was no Hindu joint family as a legal entity and I found that the 1st defendant could not succeed."

The learned Judge on appeal reversed the decision of the Magistrate stating that on close analysis of the evidence it seemed to him that this was a joint tenancy of the family which includes all four brothers. The learned Judge had regard to –

(a) the fact that rent receipts were issued to various members of the family and were only issued to plaintiff as the family representative;

(b) that it was a family home from 1937 and the father was the tenant;

(c) that the defendant paid rent for years between 1965-1968;

(d) that the issue of receipts by plaintiffs to firm Shantisroop-Jotisroop was not inconsistent with plaintiff being representative of the joint family;

(e) that the letters from the plaintiff to the defendant (D7 and D19) show that the plaintiff treated the whole family business in Malaysia as belonging to the joint family.

The learned Judge also dealt with the evidence of P.W.4, the landlord, and directed his attention to the contradictions. He formed the view that P.W.4 was trying to help the plaintiff by changing his earlier testimony. The Judge summed up by saying that on the evidence the plaintiff had failed to prove he alone was the tenant of the premises and that his brothers were mere licensees. He was also of the view that there was overwhelming evidence to support the defence contention that this was a joint tenancy of the family.

At the very outset we would like to observe that the question in issue is not one of Hindu joint family property but of a joint tenancy. The question of Hindu joint family property was not raised in the pleadings and only emerged in the course of the hearing. The sole issue is therefore one of fact to be determined in the light of the totality of the evidence. The main ground of appeal submitted by Mr. N.T. Rajah counsel for the appellant was directed to the Judge's error in upsetting the finding of fact made by the Magistrate. He also submitted that the learned Judge had erred when he misdirected himself on the onus of proof throwing it on the appellant.

Counsel for the respondent, on the other hand, submitted at length dwelling on the facts of the case. He also submitted that the Magistrate misdirected herself as to the issues and on the onus of proof. It is the respondent's contention that since the appellant was the one trying to get possession the onus was on the plaintiff to establish that the respondent was a licensee and this he failed to do.

In our view, and we stress, there was only one central issue before the Magistrate and that was whether the plaintiff was the tenant and the defendant licensee or whether both the plaintiff and the defendant were joint tenants. This sole issue clearly has to be determined essentially with reference to and in the light of the facts and the circumstances surrounding, a conclusion to be arrived at on balance of probabilities. The Magistrate cannot, in our view, be said to have erred in law and to have misdirected herself if she, after hearing and seeing the witnesses, had made a conclusion or inference on the basis of the evidence before her after giving due regard to what on balance was the weight of the evidence. In that event a judge hearing an appeal should not substitute his finding for that of the Magistrate on those facts unless the conclusion arrived at by the Magistrate was plainly wrong and any advantage which the Magistrate enjoyed by having seen and heard the witnesses was not sufficient to explain her conclusion.

There are host of authorities dealing with principles on which an appellate court should act in reviewing finding of fact, however, suffice if we refer only to the case of *Chow Yee Wah and Anor.* v. *Choo Ah Pat*[2] where it was held that –

"in the face of the finding by the trial judge on the question of fact the Federal Court were only entitled to displace his conclusion if they were satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion."

We have in this appeal scrutinized in depth the evidence analysed by the Magistrate and we can see nothing to show that the conclusion arrived at by the Magistrate on balance of probabilities, was plainly wrong. We do not therefore see any justification for the learned Judge to displace the Magistrate's finding and substitute his own. Evidence acted upon by the learned Judge was

the same evidence considered by the Magistrate in great detail. To justify the learned Judge to disturb the Magistrate's conclusion he must be satisfied that the Magistrate had failed to take proper advantage of her having seen and heard the witnesses. (See *Yahya bin Mohd.* v. *Chin Tuan Nam).*[3]

In our judgment the appeal should be allowed. We accordingly set aside the Judge's order with costs here and in the court below. The order of the Magistrate is to be restored.

Appeal allowed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Azman, Davidson & Co.*

KUMPULAN KAMUNING SDN. BHD. v. RAJOO AND 200 OTHERS

[F.C. (Abdul Hamid, Mohamed Azmi & Abdoolcader F.JJ.) August 18 & October 6, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 145 of 1982]

Labour Law – Termination of service of employees on change of ownership of rubber estate – Offer of continued employment with new owners – Rejected by employees – Employees subsequently taking up employment as new employees with new owner – Claim for termination benefits – Whether offer of employment made within the time limit – Employment (Termination and Lay-Off Benefits) Regulations, 1980, Regs. 4 & 8.

Employment – Termination of Service on change of ownership – Employees subsequently taking up employment as new employees with new owner – Claim for termination benefits.

In this case the respondents were rubber estate workers employed by the appellant company. The appellant sold part of its estates to the National Land Finance Co-operative Society Ltd. (NLF). The respondents claimed termination benefits. The appellants alleged that the respondents had refused the offer for continued service on the same terms and conditions by the new owners. The respondents had kept themselves out of work for two months but later took up employment with NLF as new employees. The Assistant Director of Labour ordered the appellant to pay $445,917.34 to the respondents as termination benefits under regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations, 1980. The appellant applied to set aside this order but this was dismissed by the Judicial Commissioner. The appellants appealed to the Federal Court.

Held: (1) there was no reason to disturb the trial court's conclusion that the language of regulation 8 of the Regulations was clear and the court should adopt the strict and literal interpretation of it;

(2) on a proper construction of regulation 8 of the Regulations the respondents had absolute choice whether to accept or refuse the offer made by the new owners for continued service without assigning any reasons;

(3) the words used in regulation 8 are not ambiguous and their meaning is plain. Therefore the strict and literal approach should be adopted. Unless the omission of the 'unreasonableness" element in regulation 8 can be shown by the appellant to give rise to an absurd and unjust situation, no court could read anything more into that regulations;

(4) in any event there was no proof in this case that the offers of service by the new owners were made in due time and on this further ground the payment of termination benefits to the respondents had been lawfully ordered.

Cases referred to:

(1) *Nothman* v. *Barnet Council* [1978] 1 W.L.R. 220, 228; [1978] 1 All E.R. 1243.
(2) *Artemiou* v. *Procopiou* [1966] 1 Q.B. 878, 888.
(3) *Reg.* v. *National Insurance Commissioner, Ex parte Hudson* [1972] A.C. 944, 1005.
(4) *Luke* v. *Inland Revenue Commissioners* [1963] A.C. 557, 577.
(5) *Kammins Ballrooms Co. Ltd.* v. *Zenith Investments (Torquay)* [1971] A.C. 850.
(6) *Duport Steels Ltd.* v. *Sirs* [1980] 1 W.L.R. 142, 157; [1980] 1 All E.R. 529.

FEDERAL COURT.

V.T. Nathan (*W. Abraham* with him) for the appellant.

B. Lobo for the respondents.

Cur. Adv. Vult.

Mohamed Azmi F.J. (delivering the judgment of the Court): This is an appeal from an order of the learned Judicial Commissioner at Alor Star dated May 23, 1982 dismissing the appellant's Originating Motion to set aside the order made by Mr. Cheah Yew Seng, the Assistant Director of Labour Sungei Petani in Labour Case No. 10/1981, wherein the appellant was ordered to pay $445,917.34 to the respondents as termination benefits under regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 – P.U.(A) 278/80 ("the 1980 Regulations" for short).

The respondents were rubber estate workers employed by Bukit Lembu Division of the appellant company which was referred to in the proceedings as KMS Estate. The other part of the